

**Members**

Rep. James Buck, Chairperson  
Rep. Thomas Saunders  
Rep. David Wolkins  
Rep. Dennie Oxley  
Rep. Joe Micon  
Rep. Terri Austin  
Sen. Allen Paul, Vice-Chairperson  
Sen. Michael Delph  
Sen. Jeff Drozda  
Sen. Timothy Lanane  
Sen. Anita Bowser  
Sen. Lindel Hume



# **INTERIM STUDY COMMITTEE ON GOVERNMENT ADMINISTRATION AND REGULATORY MATTERS**

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**Authority:** Legislative Council Resolution 06-01

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## **MEETING MINUTES<sup>1</sup>**

**Meeting Date:** September 6, 2006  
**Meeting Time:** 10:00 A.M.  
**Meeting Place:** State House, 200 W. Washington  
St., Room 404  
**Meeting City:** Indianapolis, Indiana  
**Meeting Number:** 3

**Members Present:** Rep. James Buck, Chairperson; Rep. David Wolkins; Rep. Dennie Oxley; Sen. Michael Delph; Sen. Jeff Drozda; Sen. Anita Bowser; Sen. Lindel Hume.

**Members Absent:** Rep. Thomas Saunders; Rep. Joe Micon; Rep. Terri Austin; Sen. Allen Paul, Vice-Chairperson; Sen. Timothy Lanane.

## **Call to Order**

The Chair, Representative Buck, called the meeting to order at 10:18 a.m.

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1. Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.in.gov/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

## **Testimony Regarding and Discussion of Matters Relating to Nonprofit Entities.**

The Chair recognized David Miller, the legislative director for Attorney General Steve Carter. Mr. Miller made brief remarks and introduced Mr. Brent Embry, Director of the Consumer Protection Division of the Office of the Attorney General. Mr. Embry said that the Attorney General had created a "Nonprofit Advisory Committee" to advise him about issues relating to nonprofit entities; three of the Committee members are Ben Blanton, Robert Katz, and John Mutz.

Mr. Embry explained that before 2005, the Attorney General could seek only an accounting or dissolution under applicable law when a charitable trust or nonprofit corporation<sup>2</sup> is alleged to have engaged in wrongdoing. Changes enacted in 2005 gave the Attorney General a menu of remedies, including injunctive relief, appointment of a receiver, removal of directors or trustees, and appointment of new directors or trustees. The use of any of these remedies is subject to the oversight of a court.

Mr. Embry described the examples of two entities against which the Attorney General has sought remedies. One was the Olin Schwab Foundation located in Fort Wayne. The Foundation was formed to provide job training and skill development to disadvantaged youth. The Foundation's trustees reduced the number of trustees, moved the Foundation to Nevada, and enriched themselves at the expense of the Foundation which had an endowment of several million dollars. The misconduct included buying residential real estate in Las Vegas.

The Fort Wayne Neighborhood Housing Partnership is a nonprofit corporation formed to assist in providing low income housing in Fort Wayne. The corporation started with approximately \$5.5 million in funds that dwindled to \$500,000. The corporation attempted to wind up its affairs without an accounting of the outstanding mortgages and obligations held by the corporation. The Attorney General sought court appointment of a receiver to oversee the corporation's assets. During recitation of the story, Mr. Embry said that the General Assembly may want to give the Attorney General the authority to seek a court order to freeze the assets of a nonprofit entity. Mr. Embry said that shortly after appointment of a receiver for the corporation, the corporation dissipated nearly all its remaining assets.

Mr. Embry discussed nonprofit entities classified by the manner in which they are created. The first class of nonprofit entities includes those specifically authorized by statute and often associated with a state government agency. Mr. Embry cited as examples the nonprofit corporations formed to assist the War Memorials Commission, the New Harmony Commission, and the Lewis and Clark Bicentennial Commission in carrying out their respective purposes. These nonprofit entities are subject to audit by the State Board of Accounts but are not covered by procurement laws or contract review and approval controls.

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2. Charitable trusts and nonprofit corporations will be referred to as "nonprofit entities" in these Minutes.

The second type of nonprofit entity is one that has been established by a state agency, but without explicit statutory authority. Mr. Embry said it is an open question whether a state agency can establish a nonprofit corporation without explicit authority. Mr. Embry gave as an example various nonprofit entities established over the years by the Indiana State Police.

The third kind of nonprofit entity is established by private action but has some link to a governmental purpose. Mr. Embry gave the Gary Urban Enterprise Association ("GUEA") as an example. He said that the GUEA was created to manage the Gary enterprise zone. He said that the GUEA received more than \$45 million of inventory tax money to be spent to revitalize the City of Gary. However, there is evidence that individuals have used the corporation's funds to enrich themselves by means including the purchase of real property outside the enterprise zone, even outside of Indiana.

Mr. Embry outlined possible controls that could be used to oversee nonprofit entities: audit by the State Board of Accounts; approval of contracts under state procedures, application of the "Open Door Law" to nonprofit entities; approval of nonprofit entity legal counsel by the Attorney General; and handling of nonprofit entity accounts by the Auditor of State. Mr. Embry said that changes to the statutes regulating nonprofit entities during the 2005 Session give the Attorney General sufficient tools for the present time. He stated that the process of appointing a receiver of a nonprofit corporation is costly. He said that increasing the Attorney General's oversight of nonprofit entities could require the addition of two attorney positions, related support staff, and the acquisition of services of legal and financial experts.

In response to Representative Buck's question regarding the formation of a nonprofit entity, it was explained that the formation of a corporation is governed by state law and requires filing documents with the Secretary of State. However, because the tax benefits of charitable contributions motivate donors to give money to a nonprofit entity, filing with the Internal Revenue Service to get tax exempt status is crucial. A nonprofit entity that wants to be exempt from sales tax on items it purchases would also file for that status with the Indiana Department of Revenue.

In response to Representative Buck's question about a nonprofit entity acting according to its goals or statement of purpose, Mr. Blanton said that a nonprofit corporation's goals are typically stated in the corporation's articles of incorporation and could be quite broad and general. In response to a question regarding the number of nonprofit entities that operate in Indiana, Mr. Embry estimated that there were probably at least 60,000 entities having tax exempt status of some kind.

There was discussion in response to questions from Senator Bowser about the creation of nonprofit entities affiliated with religious organizations, audits of nonprofit entities, and distribution of assets upon dissolution of a nonprofit entity. During the discussion, Mr. Embry said that the State does not typically receive a copy of a nonprofit entity's audits but there are mechanisms for obtaining them. Mr. Blanton said that a nonprofit entity must have a dissolution plan as a condition to receiving tax exempt status. The plan will direct the distribution of a nonprofit

entity's assets upon dissolution. Ultimately, if there is no way for the assets to be distributed, the assets escheat to the state.

In response to Representative Wolkins's question, Mr. Embry said that most investigations of nonprofit entities begin through information provided by citizens.

There was Committee discussion in response to questions from Representative Buck regarding the means to hold a nonprofit entity accountable, whether a donor has standing to complain about a nonprofit entity's activities, and the nature of information available about a nonprofit entity's activities. During the discussion, the Committee was informed that a nonprofit entity provides information about its activities on IRS Form 990.

John Mutz discussed events involving the Gary Urban Enterprise Association and commented that the original enterprise zone statute inadequately provided for oversight of enterprise zone associations. Mr. Mutz stated that activity of nonprofit entities is increasing around the country. He said that neither the IRS nor the Attorney General have adequate resources to oversee nonprofit entities other than in response to problems. In response to a question, Mr. Mutz explained that an enterprise association sunsets twenty years after its creation unless it receives an extension from the Indiana Economic Development Corporation. The Gary Urban Enterprise Association has not been recommended for renewal.

Senator Drozda asked whether the Attorney General was the appropriate state officer to oversee nonprofit entities or if the duty should be placed with another state officer, such as the Inspector General. Mr. Embry said the Attorney General's office did not have a position on the question, that it was a matter to be decided by the General Assembly. Mr. Mutz and Mr. Blanton explained that giving the Attorney General the power to oversee nonprofit entities derives from the English common law and that most states place this function with their attorneys general. In response to Senator Bowser's question whether there are too many nonprofit entities for the Attorney General to oversee, Mr. Miller said that problems can also arise if regulation is dispersed among too many government agencies.

Noting that many nonprofit entities receive public money, Representative Oxley asked about the criteria that trigger audit by the State Board of Accounts. Mr. Blanton said that IC 5-11 sets the standards for State Board of Accounts audits and that receipt of state money by itself isn't sufficient to trigger an audit. There was discussion whether receiving tax exempt status was a sufficient governmental benefit that should require a public audit of a nonprofit entity.

Mr. Bruce Hartman, State Examiner, State Board of Accounts, said that generally, there are three circumstances under which the State Board of Accounts undertakes an audit of a nonprofit entity: (1) When a statute specifically requires the audit. (2) The State Board of Accounts statute provides that when a nonprofit entity receives at least \$100,000 of public funds the State Board of Accounts is required to audit the nonprofit entity. (3) The State Board of Accounts has some discretion to audit nonprofit entities that are not covered by the previous two circumstances. There was discussion about cooperation between the Attorney General's office with the State Board of Accounts in regulation of nonprofit entities.

Representative Oxley asked how the State Board of Accounts knows when a nonprofit entity has received at least \$100,000 of public funds. Mr. Hartman responded that a nonprofit entity that receives public funds is required to file a form ("Form e-1") annually with the State Board of Accounts disclosing certain information, including the amount of public funds received.

There was discussion regarding a nonprofit entity's tax status upon dissolution, the role of government when a nonprofit entity engages in discrimination, and the resources available to obtain information about nonprofit entities.

The Chair summarized the presentation saying that the Attorney General has not advocated changes in the statutes governing nonprofit entities but may need additional resources if the General Assembly wants the Attorney General to exercise more oversight of nonprofit entities.

### **Eminent Domain Issues.**

Staff distributed copies of an article from the website of the Louisville Courier-Journal that described the eminent domain controversy in Floyd County.<sup>3</sup>

The Chair invited Representative Wolkins to discuss the eminent domain question. Representative Wolkins recounted the work that had been done during the 2006 Session and said that the following questions remained: (1) Whether private utilities, as discussed in the news article about Floyd County, should have eminent domain power. (2) Several appointed governmental entities have eminent domain power. Should this power be subject to the approval of an elected official or a body of elected officials? (3) The use of eminent domain in the development of rails-to-trails projects.

The Chair recognized Mr. John Scheidler, an attorney with Duke Energy. Mr. Scheidler described the situation in Floyd County as he understood it, and discussed basic eminent domain principles, including the changes made by HEA 1010-2006. He said that local units of government generally do not have jurisdiction over utilities and expressed the opinion that the ordinance adopted by the Floyd County Commissioners is unlawful. In response to a question from Senator Bowser, Mr. Scheidler briefly discussed the procedures required for the exercise of eminent domain power.

In response to Senator Drozda's question about how a utility could respond to an ordinance such as Floyd County adopted, Mr. Scheidler said there were three options. A utility company could seek a declaratory judgment from a court that the ordinance is unlawful. A utility could ignore the ordinance and seek to have it declared invalid if the county sought to enforce the ordinance against the utility. A

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3. <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20060906/NEWS02/609060583/1025> last visited September 8, 2006 at 11:05 a.m. A copy of this article is Exhibit #1 to these Minutes.

third option, which Mr. Scheidler said he would not recommend, would be for a utility company to seek approval from the county under the ordinance to use eminent domain.

After brief committee discussion about the situation in Floyd County, Representative Wolkins said he did not have any recommendations for the Committee to consider at this time.

### **Testimony Regarding and Discussion of the Privatization of Non-health Related Services Performed or Administered by State Agencies**

The Chair stated that the Committee was charged with considering the impact of privatization of state activities not related to health matters and asked for discussion by Committee members.

Senator Bowser expressed concern about the privatization of prison food services saying that she receives many complaints from inmates and others. She compared her experience eating at the state prison while she was hosted as a legislator to a time she had a meal at the prison in other than an official capacity. She described the first meal as quite good and latter meal as "slop". Senator Bowser said she is concerned that privatizing government functions leads to dissipation of accountability and abdication of responsibility.

In discussion of these issues, Rob Wynkoop, Deputy Commissioner for Finance and Procurement, Department of Administration, said that complaints regarding the food service contract can be reported to the Department of Correction Ombudsman Bureau. Mr. Wynkoop said that the Department of Correction has also formed a compliance team to monitor the food service contract. Mr. Chris Johnston, Office of Management and Budget, said that the food service contract contains performance measures. There was also discussion among Committee members about the rights of employees displaced by the food service contract, with Representative Oxley asking how many former state employees still work for Aramark (the food service contractor).

Representative Buck introduced the question of new contract awards adversely affecting Indiana businesses that lose contracts for goods or services with the State. He gave as an example a contract the State recently awarded to Office Max for office supplies. There was discussion of the impact of large contract awards on minority owned businesses and women owned businesses. There was discussion of the criteria that define an "Indiana business" for purposes of giving procurement preferences.

Any of the following factors can be used to establish a business as an "Indiana business": (1) Whether the business maintains its headquarters in Indiana. (2) Whether a majority of the business's employees are Indiana residents. (3) Whether a majority of the business's payroll is paid to Indiana residents. (4) Whether the business has made capital investments in Indiana of at least \$5 million or has annual lease payments of at least \$2.5 million. (5) Whether the business has a substantial economic impact in Indiana.

The Committee discussed the following related issues: (1) Whether the criteria defining an "Indiana business" were too broad. (2) Whether the increase in jobs by award of a contract to one business is offset by loss of jobs to other Indiana businesses. (3) The displacement of government employees by private sector employment and whether the salaries and benefits of government employees who take jobs in the private sector are comparable. (4) The availability of statistics to measure impact of purchasing decisions. (5) Setting goals for awarding contracts to minority owned businesses and women owned businesses.

In relation to discussion item #5 mentioned in the previous paragraph, Mr. Kevin Ober, Deputy Commissioner for Administration, Department of Administration, discussed the role of the Governor's Commission for Minority and Women's Business Enterprises and disparity studies done by the Department of Administration.

Responding to a question from Representative Buck, the Committee was told that information regarding displacement of state employees could be obtained from the state agency involved or the State Personnel Department. In response to Senator Hume's question asking about the purpose of the Indiana Business purchasing preference, Mr. Wynkoop said that he believes the purpose is to spur economic development in Indiana and to increase employment and property tax collections.

The Chair recognized Mr. Doug Vaughn, founder of Rite Quality Office Supplies in Kokomo. Mr. Vaughn described the adverse impact the award of the office supply contract to Office Max had on his business which had previously sold office supplies to the State. Mr. Vaughn said that the goal to award three percent of state contracts to minority owned business was insufficiently ambitious. During discussion of Mr. Vaughn's remarks, it was clarified that the minority business goal could be satisfied when a prime contractor enters into business relationships with minority owned vendors; the goal does not require that three percent of the prime contract business be awarded to minority owned businesses.

### **Other Committee Business.**

Staff distributed copies of a memorandum from the Bureau of Motor Vehicles responding to certain questions asked during the August 24 meeting.<sup>4</sup>

The Chair announced that the meeting currently scheduled for September 22 is cancelled. The Committee's next meeting is scheduled for October 5 at 10:00 a.m.

### **Adjournment.**

The Chair adjourned the meeting at 12:52 p.m.

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4. A copy of the memorandum is Exhibit #2 to these Minutes.